

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

vs.

No.

JOEZELL WILLIAMS II,

Defendant-Appellant

Lower Court No. 02-004374
Court of Appeals No. 246706

OK
Wayne CRT B. Sullivan
CRA 1/27/05

APPLICATION FOR LEAVE TO APPEAL
NOTICE OF HEARING

128294
APR
4/19
27338 KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals

ANA I. QUIROZ (P-43552)
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226-2302
Phone: (313) 224-0981

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CLERK
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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

The People apply for leave from the January 27, 2005 decision of the Court of Appeals which affirmed in part and vacated Defendant's conviction of larceny from a person.¹

This case presents an issue of jurisprudential significance because *People v Bigelow*² binds the Court of Appeals to its flawed ruling which erroneously extended the double jeopardy analysis from a case involving a conviction only under a felony murder to one where the jury found both the premeditation theory and the felony murder theory, beyond a reasonable doubt. Based on *Bigelow*, the Court of Appeals in this case vacated Defendant's conviction and sentence for larceny from a person, the predicate felony to Defendant's felony murder conviction, even though the jury had also convicted him of first degree premeditated murder.

Where a defendant is convicted under alternative theories of first-degree murder, a conviction of the predicate felony to felony murder does not violate double jeopardy. Therefore, *Bigelow* must be modified.

The People request that this Court either grant the People's application for leave to appeal and consider the jurisprudentially significant issue presented or peremptorily reverse the decision of the Court of Appeals and reinstate Defendant's conviction and sentence.³

¹*People v Williams*, 265 Mich App 68 (2005), attached.

²*People v Bigelow (Amended Opinion)*, 229 Mich App 218, 220-221 (1998).

³ MCR 7.302(B)(3) & (5); MCR 7.316(A)(7).

STATEMENT OF QUESTION PRESENTED

I.

Both the United States and Michigan Constitutions prohibit multiple punishments where not legislatively authorized. Even if conviction and sentence for both first-degree murder on a theory of felony murder and the predicate felony violates jeopardy, if conviction for first-degree murder is also supported by the alternative theory of premeditation, so that the separate conviction is no longer necessarily predicate, does conviction and sentence for the predicate felony violate jeopardy?

The Court of Appeals answered: YES

The People answer: NO

Defendant answers: YES

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant, Jozzell Williams, was charged with first degree premeditated murder,⁴ first-degree felony murder,⁵ larceny from the person of another,⁶ mutilation of a dead body,⁷ felon in possession of a firearm,⁸ and possession of a firearm during the commission of a felony.⁹

At trial, Donald Chapman testified that on the night of the shooting, he was driving Defendant and the victim, Arvella Coffee, around and socializing. Defendant sat in the front passenger seat and the victim was in the back seat, behind Defendant. On the way to Defendant's sister's house, Chapman suddenly heard a loud boom and saw "the whole car light up." He heard a second shot and realized that Defendant had a gun and was shooting the victim. Chapman testified that he saw Defendant lean over the front passenger seat toward the back. Defendant ordered the victim to lay down, forced the victim's head down on the car seat, and fired two more times.¹⁰ Defendant told Chapman to keep driving and shot the victim two more times.¹¹

Chapman testified that he did not know of any problems between Defendant and the victim, nor had they been arguing prior to the shooting. The only explanation that Defendant offered

⁴MCL § 750.316(1)(a).

⁵MCL § 750.316(1)(b).

⁶ MCL § 750.357

⁷MCL § 750.160.

⁸MCL § 750.224f.

⁹ MCL § 750.227b.

¹⁰8/12/02, 208-213.

¹¹8/12/02, 213-214.

afterward was that he had to “survive out here.”¹² Scared that Defendant would kill him too, Chapman continued to drive wherever Defendant directed. Chapman turned into an alley as Defendant instructed and Defendant pulled the victim out of the car. Defendant took the victim’s shoes, wallet, marijuana, and money. Then, he got back in the car and told Chapman to take him to a gas station. After purchasing a gas can and some gas, Defendant directed Chapman back to the alley, where Defendant poured the gas on the victim’s body, and lit him on fire.¹³

After dropping Defendant off, Chapman drove straight home and told his father what happened. They immediately drove to the police station where Chapman reported the shooting.¹⁴ The police found the victim’s body in the alley and arrested Defendant shortly thereafter.¹⁵

Defendant’s girlfriend, Linda Payne, testified that Defendant told her about the shooting and demonstrated how he fired the gun six times in the victim’s face as the victim was in the back seat of the car “rolling up some weed.”¹⁶

The jury convicted Defendant as charged on all counts.¹⁷ At sentencing, the trial court entered a single conviction of first degree murder based on alternative theories of first degree premeditated murder and first degree felony murder, and ordered Defendant to serve life imprisonment. Among

¹²8/12/02, 214-215.

¹³8/12/02, 215-220.

¹⁴8/12/02, 228-238.

¹⁵8/13/02, 98-101, 170-177.

¹⁶8/13/02, 116, 139-141.

¹⁷8/19/02, 104-105.

his other sentences, the trial court also imposed 76 to 240 months incarceration for the larceny conviction.¹⁸

Defendant appealed his conviction and sentence to the Court of Appeals. In *People v Williams*, the court affirmed in part and vacated Defendant's conviction and sentence for the underlying felony of larceny from a person.¹⁹

The People apply for leave to appeal from the decision of the Court of Appeals.

¹⁸9/9/02, 13-15. See attached Sentencing Transcript and Judgement of Sentence Commitment to Correction Department .

¹⁹See *Williams, supra*, attached.

ARGUMENT

I.

Both the United States and Michigan Constitutions prohibit multiple punishments where not legislatively authorized. Even if conviction and sentence for both first-degree murder on a theory of felony murder and the predicate felony violates jeopardy, if conviction for first degree murder is also supported by the alternative theory of premeditation, so that the separate conviction is no longer necessarily predicate, conviction and sentence for the predicate felony does not violate jeopardy.

Standard of Review

Because Defendant posed no objection to being sentenced for first degree premeditated murder, first degree felony murder and larceny from a person, review is for plain error. To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” Reversal is warranted only when the plain, forfeited error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant’s innocence or when the plain error resulted in the conviction of an actually innocent person.²⁰

Discussion

The Double Jeopardy Clauses of the United States and Michigan Constitutions safeguard against successive prosecutions and multiple punishments for the same offense.²¹ In the multiple

²⁰ *People v Carines*, 460 Mich 750 (1999).

²¹ US Const., A.m. V; Const. 1963, art. 1, §§ 15.

punishment context, the clauses seek to ensure that the defendant's total punishment will not exceed the scope of punishment provided by the Legislature.²²

In *People v Nutt*,²³ this Court adopted the *Blockburger*²⁴ “same elements” test as the test intended by the ratifiers of the 1963 Constitution to be applied for discerning the meaning of the term “same offense” for purposes of successive prosecutions. In *People v Mario Curvan*,²⁵ scheduled for oral argument before this Court next month, the People argue that for purposes of multiple punishments, “same offense” should be determined by application of the same test as for successive prosecutions, the ultimate focus is not upon whether two statutes proscribe the same offense, but whether the Legislature intended there to be cumulative punishments from both statutes.²⁶ But in determining legislative intent, *Blockburger* is but a test of statutory construction and should only

²² *People v Denio*, 454 Mich 691, 706 (1997); *People v Sturgis*, 427 Mich 392, 398 (1986).

²³ *People v Nutt*, 469 Mich 565 (2004).

²⁴ *Blockburger v United States*, 284 US 299, 52 S Ct 180, 76 L Ed 2d 306 (1932).

²⁵ *People v Curvan*, COA No. 242376, application granted, *People v Curvan*. 471 Mich 914 (2004).

²⁶ *Ohio v Johnson*, 467 US 493, 498-499, 104 S Ct 2536, 2540, 81 L Ed 2d 425 (1984); *Albernaz v United States*, 450 US 333, 344, 101 S Ct 1137, 1145, 67 L Ed 2d 275 (1981) (“[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed”); *Whalen v United States*, 445 US 684, 688, 100 S Ct 1432, 1436, 63 L Ed 2d 715 (1980) (“[T]he question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized”); *Brown v Ohio*, 432 US 161, 165, 97 S Ct 2221, 2225, 53 L Ed 2d 187 (1977) (“The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments”).

be applied if helpful to ascertaining legislative intent.²⁷ It is not helpful when applied to predicate and predicate-based offenses.²⁸ But a resolution of *People v Mario Curvan*²⁹ adverse to the People will not resolve the problem posed by this case.³⁰

In this case, the jury convicted Defendant of both first-degree premeditated murder and first degree felony murder, as well as larceny from the person of another. The trial court entered a single conviction of first-degree murder, based on alternative theories of premeditated murder and felony murder. It sentenced Defendant to one term of life imprisonment and a concurrent sentence for the larceny conviction.

Citing *People v Bigelow*,³¹ the Court of Appeals affirmed Defendant's conviction and sentence on one count of first-degree murder based on two theories. But ruling that it was also bound by the second portion of *Bigelow*,³² the court reluctantly vacated Defendant's conviction and sentence for the predicate felony. In so doing, the court invited this Court to review and modify *Bigelow*.

Bigelow blindly extended the double jeopardy analysis from a case involving a conviction only under a felony-murder theory to one where the jury explicitly found both the premeditation theory and the felony-murder theory to apply...a more

²⁷*People v Robideau*, 419 Mich 458, 486 (1984); *People v Wakeford*, 418 Mich 95, 107 (1983).

²⁸*Whalen, supra*, 445 US at 708-709.

²⁹*Supra*.

³⁰Though a resolution of *Curvan* consistent with the People's argument would resolve this case.

³¹*People v Bigelow (Amended Opinion)*, 229 Mich App 218, 220-221 (1998).

³²*Bigelow, id*, 229 Mich App at 221-222.

thoughtful analysis might lead to the conclusion that the conviction for the underlying felony need not be vacated where, as here (and in *Bigelow*), it can be determined with certainty that the jury accepted the premeditation theory (either in addition to or instead of the felony-murder theory).³³

Indeed, in so far as *Bigelow* relied on *People v Gimotty*³⁴ for vacating the underlying felony, its reasoning was flawed. The *Gimotty* Court reviewed double jeopardy as it related to convictions of felony murder and the predicate felony only.³⁵ Since there was no alternative theory upon which the defendant's first-degree murder conviction was based, the *Gimotty* Court ruled in accordance with the prevailing law.³⁶ Because the jury in *Bigelow* convicted the defendant of both premeditated murder as well as felony murder, *Gimotty* was inapplicable.

As Judge O'Connell, a member of *Bigelow* panel, stated in his dissenting opinion here, double jeopardy is not offended by conviction for premeditated murder and larceny, so that "[t]o strike the larceny conviction, even at the direction of an analytically deficient precedent, effectively nullifies defendant's conviction and sentence for premeditated murder, notwithstanding the fact that a jury verdict supports the conviction and authorizes the consequent punishment."³⁷

Because convictions of premeditate murder and larceny from a person are undoubtably different offenses regardless of the test the reviewing court applies, they do not violate double jeopardy. No further analysis is needed.

³³*Williams, supra.*

³⁴*People v Gimotty*, 216 Mich App 254 (1996).

³⁵ *Id.*, 216 Mich App 259-260.

³⁶*People v Passeno*, 195 Mich App 91 (1992); *People v Wilder*, 411 Mich 328, 352 (1981). Ironically, *Passeno*, was overruled by *Bigelow, supra*, 229 Mich App at 221.

³⁷*Williams, supra.*


For these reasons, *Bigelow's* ruling, as it pertains to predicate felonies, was erroneous and should be modified.

RELIEF

WHEREFORE, the People request that this Court either grant the People's application for leave to appeal or peremptorily reverse the decision of the Court of Appeals and reinstate Defendant's conviction and sentence for larceny from a person.

Respectfully submitted,
KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals


ANA QUIROZ P43552
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-0981

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